



**INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
EAST CENTRAL HIGH SCHOOL, ST. LEON**

CONSTITUTIONAL LAW

Does Article II, Section 9 of the Indiana Constitution, which prohibits one person from holding two lucrative offices at the same time, prohibit a person from being both a county sheriff's deputy and a county commissioner?

*Walter
Thompson
v. Mark
Hays*

**Appeal
from:**

Scott Circuit
Court

The Honorable
William E.
Vance, Special
Judge

**Oral
Argument:**

March 1, 2007
1:30 p.m. –
2:10 p.m.
20 minutes
each side

CASE SYNOPSIS

**Facts and Procedural
History**

For some time prior to January 1, 2003, Mark Hays was a Scott County Sheriff's Deputy. Hays was subsequently elected a Scott County Commissioner for District 3 and took office on January 1, 2003. He also continued to work as a Sheriff's Deputy.

On March 22, 2003, Walter Thompson, a resident of and property-holder in Scott County, filed a lawsuit against Hays alleging that in his positions as a Scott County Commissioner and Sheriff's Deputy, Hays was unconstitutionally holding two lucrative offices. Thompson requested that the trial court determine that Hays could not hold both offices at the same time and order him removed from his position as a Sheriff's Deputy. Thompson also requested that the trial court order Hays to reimburse the county for the pay he had accepted for his position as a Sheriff's Deputy since January 1, 2003, and to pay additional damages.

Hays filed a motion to dismiss. In his motion to dismiss,

Hays alleged that Thompson's complaint failed to state a claim on which relief could be granted. After a hearing, the trial court granted Hays' motion to dismiss. Thompson appeals the trial court's order dismissing his lawsuit.

Parties' Arguments

Article II, Section 9 of the Indiana Constitution states that "no person may hold more than one **lucrative office** at the same time, except as expressly permitted in this Constitution." Indiana Code section 3-8-1-3 also prohibits one person from holding two lucrative offices ("A person may not hold more than one (1) lucrative office at a time, as provided in Article 2, Section 9 of the Constitution of the State of Indiana."). In filing his complaint, Thompson alleged that Hays was holding two lucrative offices by being both a Scott County Sheriff's Deputy and a Scott County Commissioner. In filing a motion to dismiss, Hays alleged that the law does not support Thompson's allegations, and the trial court agreed with Hays when it granted his motion.

On appeal, Thompson contends that, under Indiana law, sheriff's deputy and county commis-

*Thompson v. Hays***Case Synopsis (continued)**

sioner are both “lucrative offices,” and therefore, the trial court should not have granted Hays’ motion to dismiss. Thompson asserts that Indiana law is clear that county commissioner is a “lucrative office.” He acknowledges that Indiana law makes a distinction between an **office** and **employment**, but maintains that deputy sheriff is also an office, not mere employment. He also contends that the trial court erred in relying on the case of *Gaskin v. Beier* in making its decision. In *Gaskin*, this court considered whether a person who was both a deputy town marshal and a member of the town board of trustees was occupying two lucrative offices and decide that he was not. Thompson contends that because *Gaskin* dealt with city government and this case deals with county government, *Gaskin* does not decide the outcome of this case. Finally, Thompson asserts that being both a county commissioner and a deputy sheriff is a conflict of interest because the deputy sheriff must follow the directives of the commissioners’ office, and the commissioners determine the pay, hours, benefits, and other matters for deputy sheriffs. For these reasons, Thompson contends that the trial court should not have dismissed his complaint.

Hays agrees with Thompson that county commissioner is a lucrative office. He concedes that the position of sheriff is an office. He contends, however, that the position of deputy sheriff is not an office, but an employment not subject to the constitutional prohibition. He cites various Indiana statutes in support of his argument. The lan-

guage of the statutes he cites refer to “the county officer and his deputies and other employees” or state that “the members of [a county police force] are employees . . . and the sheriff shall assign their duties.” Hays contends this shows a clear recognition of the difference between the officeholder – the sheriff – and the employees – the deputies and other members of a county police force. Hays contends that the trial court correctly determined that he was not a dual officeholder and correctly dismissed Thompson’s complaint.

GLOSSARY OF TERMS

A **lucrative office** is defined as an office for which a person receives compensation in exchange for his services.

An **office** is characterized by the continuing performance of duties created by law and for the public benefit. An officer has powers of supervision and control.

An **employment** is created by contract and is a position subject to the supervision and control of others.

TODAY'S HOST

**Hon. G. Michael Witte,
Dearborn Superior Court
Lawrenceburg**

G. Michael Witte is judge of the Dearborn Superior Court No. 1, Lawrenceburg, Indiana. He served as judge of the Dearborn County Court from 1985 - 2000. He received both his B.A. and J.D. degrees from Indiana University, and serves on the law school's Alumni Board. He is a 1991 graduate of the Indiana Judicial College, the 2002 class of the Graduate Program for Indiana Judges, and is a member of the Indiana Commission on Courts.

Judge Witte served as the Judicial Fellow for the National Highway Traffic Safety Administration (NHTSA) from 1995-98. He served as Chairman of the American Bar Association National Conference of Specialized Court Judges, 2005-06. Judge Witte is the first Asian American judge in Indiana and serves on the ABA Judicial Division Standing Committee on Minorities in the Judiciary.

In addition, Judge Witte has served as faculty for programs presented by the American Bar Association, the National Judicial College, NHTSA, the National Center for State Courts, the National Criminal Justice Association, the Indiana Judicial Center, and the Indiana Continuing Legal Education Forum. Judge Witte's teaching experience is primarily in the field of impaired driving, traffic court, and small claims issues. His legal teaching assignments have occurred in Arkansas, Hawaii, Indiana, Illinois, Ohio, Florida, Georgia, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, South Carolina, Texas, Virginia, Toronto, Canada, and Washington, D.C.

Judge Witte has performed NHTSA assessments of impaired driving programs for Hawaii, Missouri, Montana, South Carolina, Rhode Island, and Kansas. Judge Witte joined The National Judicial College faculty in 1994.

TODAY'S PANEL OF JUDGES

Hon. John G. Baker (Monroe County), Presiding

- Judge of the Court of Appeals since June 1989

John G. Baker is originally from Aurora in Dearborn County and now resides in Boone County. Previously he lived in Monroe County for 35 years. For nearly 18 years, he has served as a Judge of the Indiana Court of Appeals representing the First District and has authored more than 3,000 majority opinions. Prior to becoming an appellate court judge, he served as county court and superior court judge for 13½ years in Bloomington, disposing of more than 15,000 cases.

Judge Baker received his A.B. degree from Indiana University in 1968 in History and his J.D. from the Indiana University School of Law — Bloomington in 1971. He received his LLM in Judicial Process from the University of Virginia in 1995. Before assuming the trial bench, he was a partner in the firm of Baker, Barnhart and Andrews in Bloomington and was a Captain in the U.S. Army Reserves.

For 27 years Judge Baker has taught as an adjunct professor at Indiana University's School of Public and Environmental Affairs and for three years the School of Law in Bloomington. In addition, Judge Baker has served on the faculties of the Indiana Judicial College, Indiana Continuing Legal Education Forum, and the National Institute of Trial Advocacy.

His professional associations include the American, Indiana State, Monroe County and Indianapolis Bar Associations. For the latter, he served as Vice-President in 1995. He has been a member of the Indiana Judges Association's Board of Managers continually since 1979 and served as its President from January of 1987 through June of 1989. Judge Baker has been active in community and civic affairs as well. In addition to his church, YMCA, and other similar organizations, the Judge has been active in Boy Scouts of America since his youth.

Judge Baker, who was retained on the Court by election in 1992 and 2002, lives near Zionsville with his wife, Margaret (Peggy) Paul Baker. He has three adult sons.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began just prior to the Court's centennial in 2001.

Today's oral argument is the 178th case the Court of Appeals has heard "on the road" since early 2000.

Among the sites for traveling oral arguments are law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. L. Mark Bailey (Decatur County)

- Judge of the Court of Appeals since January 1998

L. Mark Bailey was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in January of 1998 and was re-tained on the Court by election in 2000. Before his appointment, Judge Bailey was a trial court judge, an administrative law judge, and a practicing attorney. He earned his B.A. from the University of Indianapolis in 1978; his J.D. from Indiana University School of Law at Indianapolis in 1982; and his M.B.A. from Indiana Wesleyan University in 1999.

During his legal career, Judge Bailey has served public interest and professional organizations in various capacities. He chaired the Local Coordinating Council of the Governor's Task Force for a Drug-Free Indiana and the Judicial Conference Alternative Dispute Resolution committee. He also served on the Board of Managers of the Indiana Judges Association and the Judicial Ethics Committee of the Indiana Judicial Center.

Judge Bailey is Past-Chair of the Indiana Pro Bono Commission, having been awarded the Indiana Bar Foundation's Pro Bono Publico Award and the 2002 Randall Shepard Award for his pro bono contributions. His writings include, "A New Generation for Pro Bono," published in the *Indiana Lawyer* in 2006. He is also a certified civil mediator and a Master in the Indianapolis American Inn of Court.

A strong supporter of law-related education, Judge Bailey is currently a member of the Judicial Education Committee of the Judicial Conference of Indiana. He is also an adjunct professor at the University of Indianapolis and, in February of 2006, served as the Distinguished Jurist in Residence at Stetson University College of Law. In 2004, Judge Bailey and his First District colleagues received the Indiana Bar Foundation Law-Related Education Award for their commitment to bringing oral arguments into community settings. Judge Bailey is also a frequent presenter at Indiana Continuing Legal Education seminars, and he regularly volunteers to judge law school trial advocacy and moot court competitions and to teach National Institute of Trial Advocacy programs.

The 15 members of the Indiana Court of Appeals issue some 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.

TODAY'S PANEL OF JUDGES

Hon. Margret G. Robb (Tippecanoe County)

- Judge of the Court of Appeals since July 1998

Margret G. Robb was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis. Prior to joining the Court she was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender.

Judge Robb chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana; and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an officer for the Indiana State Bar

Association, Indiana Bar Foundation, Tippecanoe County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges.

Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YMCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was retained on the Court of Appeals by election in 2000, lives in West Lafayette with her husband, a Professor of Communication at Purdue. Their son, a graduate of the United States Naval Academy, is on active duty with the U. S. Navy.

ATTORNEYS FOR THE PARTIES

For Appellant, Walter Thompson:
Joseph Leon Payne
Payne Law Firm
Austin, Indiana

Joseph Leon (Joe) Payne was born in New Castle, Indiana, on March 19, 1958. He graduated from Austin High School as Valedictorian in 1976. In 1980, he graduated from Indiana University Southeast with a Bachelor of Arts degree in Chemistry. Mr. Payne was honored that year by the American Chemical Society as the Most Outstanding Indiana University Student in Chemistry. In December, 1982, he received a received a Jurisprudence Doctorate (J.D.) from Indiana University School of Law —Indianapolis.

In 1983, Mr. Payne entered into the private practice of law. He has a general practice which involves almost all areas of the law with a concentration in litigation.

Mr. Payne is admitted to practice before the U.S. District Court for both the Northern and Southern Districts of Indiana and the United States Court of Appeals for the 7th Circuit. He is a member of the Indiana State Bar Association, Indiana Trial Lawyers Association and Association of Trial Lawyers of America. Over the years he has been active in the Jaycees, Lions Club, Little League Baseball, YMCA sports, Alumni Associations, Church and various other organizations.

Opinion in this case expected:

By late spring or summer 2007

Mr. Criswell will be informed when the Court hands down this opinion. If snow days mean you're still in school when the decision is published, check out the Court's website to read it.

Court of Appeals opinions are available online at <http://www.in.gov/judiciary/opinions/appeals.html>.

Locate archived opinions at <http://www.in.gov/judiciary/opinions/archapp.html>

For more information, please visit the Indiana Court of Appeals website at <http://www.in.gov/judiciary/appeals/>

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ATTORNEYS FOR THE PARTIES

For Appellee, Mark Hays: Robert L. Barlow, II Barlow Law Office Madison, Indiana

Robert L. Barlow, II graduated from Ball State University in 1972 with a Bachelors of Science in Education. He received his law degree from Mercer University in Macon, Georgia in 1980 and began practicing in Madison, Indiana with the law firm of Cooper, Cox, Jacobs and Reed. He has practiced in Madison since then, engaging in the general practice of law while also serving as Madison City Attorney since 1995.

Mr. Barlow is a member and past president of the Jefferson County Bar Association, the Indiana Bar Association, the State Bar of Georgia, Indiana Trial Lawyers Association and the Association of Trial Lawyers of America.

Mr. Barlow served as a teaching assistant at the Walter F. George School of Law at Mercer University in 1979. He authored a student note while a member of the Mercer Law Review entitled "*Treatment of Guess Passengers: Georgia Maintains Its Majority Rule*", 31 Mercer Law Review 1061 (1980).

Between undergraduate and law school, Mr. Barlow was engaged in education and the insurance industry. He taught fifth grade in a mission school in Marsh Harbor, Abaco, Bahamas and was subsequently employed as a claims representative by Farm Bureau Insurance. Mr. Barlow was licensed by the State of Indiana to teach Social Studies, with a primary concentration in Economics and a secondary concentration in American History.

While living in Madison, Mr. Barlow has been a member of numerous boards and organizations, including the Madison Rotary Club, the Jefferson County Youth Shelter Board, the Board of the Friends of Shawe and Pope John Schools, Inc., the Jefferson County United Way Board, the Madison Urban Enterprise Association, the Washington Fire Co. No. 2, the Archdiocese of Indianapolis Catholic Community Foundation, and the Indiana Gaming Commission.

Mr. Barlow is married to the former Michele Fondiller, a teacher at Pope John XXIII Elementary School in Madison; and the father of Colene Barlow Durocher, a copy writer with Agency.com in New York City, and Trey, a third-year law student at Indiana University School of Law - Indianapolis.

AMICUS BRIEFS

A person who is not a party to a lawsuit may file a brief of amicus curiae, with permission of the Court, if he or she has a strong interest in the subject matter.

- There are no amicus briefs in this case.